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In The
Supreme Court of the United States

OCTOBER TERM, 1969

No. 1247

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

versus

HALL LUMBER SALES, INC.,
Respondent.

(Brief in Opposition)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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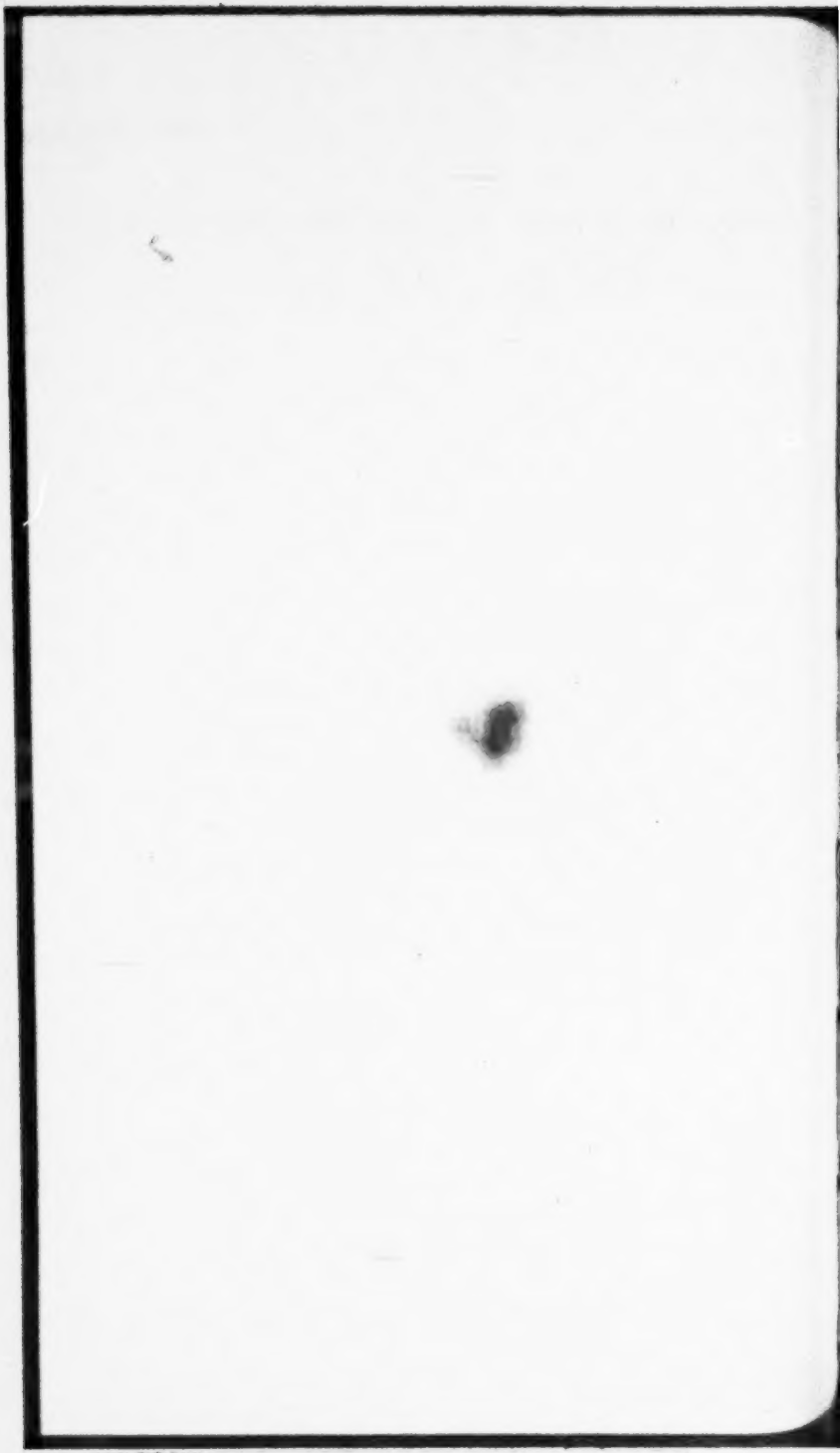

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Hall Lumber Sales, Inc., Respondent, prays that a writ of certiorari be denied to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on December 5, 1969.

REASONS FOR DENYING THE WRIT

The Respondent does not dispute the question presented, the facts recited, the statement by the petitioner, or the citations contained in the petition for a writ of certiorari.

The respondent does submit that the result in the decision of the United States Court of Appeals for the Seventh Circuit in New York Central R. Co. v. Trans-American Corp. (CCA 7th) 108 F. 2d. 994 was supported by both law and logic and is not in conflict with the Interstate Commerce Act, Act of March 4, 1927 and Act of September 18, 1940.

The petitioner recites that the decision in Trans-American Corp. (and the instant case) are directly in conflict with the decision in the case of North Western Pacific R. R. Co. V. Burchwell, Inc. 349 F. 2d. 497 and with the decision in the case of New York Cent. R. Co. v. Warren Ross Lumber Co., 137 N. E. 324. The facts in each case are typical: a shipper or consignor delivers goods to a carrier but before the goods are delivered to the consignee, a diversion or reconsignment is ordered by the consignee with the instruction to the carrier to collect the freight from the new consignee.

The Ross Lumber decision held that the diverting consignee was liable for the freight and that it was "not part of the contract between consignor and carrier that the latter shall collect its bill of the consignee. The carrier may neglect to collect of the consignee and collect of the consignor."

The Burchwell decision held that the only way for a diverting consignee to be released was to give written notice to the carrier that he was acting only as agent to give the carrier the name of the true or beneficial owner of the shipment.

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The Transamerican decision held that the instructions from Transamerican to the carrier to collect the charges from the new consignee amounted to an offer and that the subsequent shipment by the carrier with delivery to the new consignee was an acceptance of Transamerican's offer; therefore no recovery could be had from Transamerican.

In the Ross Lumber case, Ross Lumber Co. notified the carrier to deliver the shipment to another party upon arrival of the cars at Boston (the original destination point) but not to deliver until the new consignee paid the freight charges. The Carrier made delivery without collecting the freight. Since Boston was the named destination in the bill of lading, it took a new contract to move the shipment further. In the new contract, Ross Lumber Co. was the consignor and not the consignee. Consequently, Ross Lumber should not be authority for holding a diverting consignee liable. Even if Ross Lumber Co. was a consignor, it should not have been liable unless it had possession of the bill of lading and therefore could have executed the nonrecourse clause. The necessary facts are missing so that it cannot be completely distinguished from Transamerican. However, it does appear that the contract between Ross and the Carrier contained two elements: (1) delivery of the shipment to a third party upon arrival and (2) delivery only upon payment of freight charges. The clear intent of the contract would be avoided by omitting one of the provisions.

The Burchwell case quoted Ross Lumber as being responsible for the 1927 amendment to Section 3 (2) of the Interstate Commerce Act providing that a consignee was liable for charges found due after delivery unless before delivery, the consignee notified the carrier that it was acting only as an agent and unless it gave the name of the beneficial owner. The Court in Ross Lumber held that the order directing further shipment to a third party (after arriving at its original destination) was such an

exercise of dominion that the carrier could presume that Ross Lumber was the owner of the goods and such presumption would be made unless the original consignee notified the carrier that it was only acting for the beneficial owner and that it was not the owner of the goods. Burchwell has taken this section to apply to all charges due at the time of delivery. This section clearly excludes charges due at delivery and specifies only those charges not billed at the time of delivery, such as undercharge in the rate or demurrage charges. The situation described by the 1927 amendment had no application to either Ross Lumber or to Transamerican as in either case there was no indication or claim that the charges in question were "beyond those billed against him at the time of delivery for which he was otherwise liable which were found to be due after the property had been delivered to him." The key word is "after". Since the consignor has the right to execute the nonrecourse clause which would relieve it of any liability, the diverting consignee who does not receive delivery of the bill of lading can do likewise by specifying collection before delivery in the order of reconsignment.

Transamerican therefore held that the instructions were contractual and further that the instructions were "an offer which the carrier, by its act of performance, accepted and thus a contractual relation resulted." The Court noted that the execution by the original consignor of the nonrecourse clause relieved it of responsibility and the diverting consignee, Transamerican, never had the opportunity to execute the clause because it never had possession of the bill of lading.

In 1940, Congress again amended Section 3 (2) of the Interstate Commerce Act by adding the following:

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"On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner and where such shipments are refused or abandoned at ultimate destination and said beneficial owner shall be liable for all legally applicable charges in connection herewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges, and an action for the enforcement of his liability may be begun within the same period provided in the case of an action against a consignee who has given erroneous information as to the beneficial owner."

The Burchwell case, like Ross Lumber, first assumes that an order of reconsignment is the exercise of such dominion as to attach liability on the original consignee. The Burchwell case went on to hold that the 1940 amendment to Section 3 (2) was Congressional disapproval of the Transamerican decision. Examination of the 1940 amendment will show that it does not apply to a diverting consignee who gives instructions to the carrier to collect from a new consignee before delivery and the new consignee subsequently accepts delivery and then does not pay. The 1940 amendment applies to cases where the consignee who before accepting delivery notifies the carrier of its agency and of the name of the beneficial owner and where further that agent reconsigns or diverts and where further the shipment is abandoned or refused at the ultimate destination. There is, therefore, no delivery to a new consignee for the 1940 amendment to Section 3 (2) to apply. The amendment goes far from disapproving of Transamerican.

Private contracts should be enforced whenever possible and

estoppel should be allowed in defense whenever possible except when it would result in unjust discrimination. The Transamerican case should and can be followed in all those cases where the diverting consignee never took delivery and where the diverting consignee gave the carrier instructions to collect from the new consignee, subject only to the exceptions specifically enumerated in the Interstate Commerce Act.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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